ees, gathered evidence, including asking employees personal questions about their lifestyle, and represented the employees before a management board that included the two remaining personnel managers. Under these facts Baroni was not willing to conclude that the lack of a steward was "outcome determinative," as had Heinsz and Roberts in the prior two cases.[20]

Conclusion

In sum, the general rule with reference to the exclusion of evidence in arbitration even when criminal charges are involved is that absolute exclusion is to be avoided. With reference to searches, use of informers, surveillance, and similar techniques, the rule must be to balance the important right of employee privacy and the requirement that the employer act reasonably in line with its genuine need to protect property and to avoid or control theft, drug use, and other serious quasi-criminal misconduct in the workplace. Under these circumstances the standard must focus on the reasonableness of the action, balanced against the intrusion into the employee's privacy. "'Reasonableness,' in turn, requires some showing that the employer had good cause to suspect illegal activity on the part of the employee," or that it had a general and well-publicized rule articulating a fairly administered program of searches and interrogation.[21] The analysis under a balance of interests rule is likely to produce more acceptable results than a continued attempt at a flawed analogy to the exclusionary rules of evidence developed for the courts and never contemplated for use in the workplace to test admissibility or weight of proffered evidence.

III. OPINIONS AND AWARDS: INADVERTENT RESULTS

CHARLOTTE GOLD*

It is not easy pleasing the parties. Sometimes they complain that we say too little, other times that we say too much. One

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[20]*Trailways, supra* note 16; *General Tel. Co. of Cal., supra* note 18.

[21]Hill and Sinicropi, Evidence in Arbitration, 2nd ed. (Washington: BNA Books, 1987), 253. For similar balance where there is need to reconcile the interests of employees and property rights of management, *see Beth Israel Hosp. v. NLRB,* 437 U.S. 483, 98 LRRM 2727 (1978); *Republic Aviation Co. v. NLRB,* 324 U.S. 793, 16 LRRM 620 (1945); *Peyton Packing Co.,* 49 NLRB 828, 12 LRRM 183 (1943).

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advocate, for example, upon receiving a decision from a young arbitrator known for her carefully reasoned opinions, was heard to observe, "Ms. X found a hole in my case—and proceeded to drive a truck through it."

While some may despair to find that there may be perils in producing even a well-analyzed opinion, the real problem was not that the arbitrator reasoned too well, but that she reasoned too persistently. As authors of arbitral decisions, we recognize that we must be concerned with not only what we say but also how we say it.

We hope that our opinions will be persuasive, but we know, and the parties expect, that on occasion they will take issue with our analysis. When they do, it should be for the best of reasons—because there is an honest disagreement about how the case should be decided—and not because we have clouded the matter with unnecessary or erroneous remarks.

Opinion Writing

According to the Code of Professional Responsibility, arbitral opinions should be forthright "to an extent not harmful to the relationship of the parties" and should avoid "gratuitous advice or discourse not essential to disposition of the issues."[1] Members of the arbitration profession have long recognized the danger of the casual remark, usually made without malice but often without forethought, that can cause disruption among the parties. Arbitrator William Simkin, for example, noted in 1952: "It is quite possible for an arbitrator to stir up a hornet's nest by some statement in his opinion which has an adverse effect on the relationship between the parties entirely unpredictable to him when the opinion is written."[2]

Under ideal circumstances, we hope that our opinions will clarify the mutual obligations of the parties under their contracts and that our decisions will help them to resolve similar disputes without having to resort to arbitration in the future. Realistically, however, we know that this does not always happen.

On rare occasions, opinions may be so unintelligible or have so missed the mark that the parties agree not to rely on our

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[1]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, 6C1, Awards and Opinions, 23.

[2]Simkin, Acceptability as a Factor in Arbitration Under an Existing Agreement (Philadelphia: Univ. of Pa. Press, 1952), 65.

awards—or on us—in the future. In other cases, rather than settle an issue, a decision may galvanize the parties to return to the bargaining table in an effort to obtain through negotiations rights they thought that they had or, at the very least, hoped that a neutral third party would conclude that they had under the contract. In a study published in 1970, Arbitrator Donald Petersen found that one out of five arbitration awards led to an attempt on the part of the union to alter a contractual clause through further negotiations.[3] Thus, rather than settle issues, we may in some instances merely serve to hone the parties' differences. The knowledge that we are players in a fluid bargaining relationship should cause us to take special steps to ensure that we are not a hindrance to the process.[4]

There is little dispute that only the award is final and controlling on the parties. The opinion is just commentary and has no binding effect.[5] But great deference is often paid to an arbitrator's opinion and thus the impact of even the most casual comment may be considerable.

Pitfalls in Decision Making

At the 36th Annual Meeting of the Academy, a management representative suggested that an "arbitrator may take what has been presented at the hearing and imbue it with traits and characteristics that are, at best, tainted assumptions and, at worst, errors of fact."[6] Unfortunately, when arbitrators err, it is usually the result of too little familiarity with the parties and their bargaining relationship. In such cases arbitrators draw the wrong inference from what is or is not said and reach faulty conclusions about the respective rights of the disputants. Although the parties may share some of the responsibility here (for their failure to educate us adequately), it is always wise, as we are often warned, to avoid racing toward hasty conclusions.

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[3]Petersen, *Consequences of the Arbitration Award for Unions,* 21 Lab. L.J. 614 (1970).

[4]In his study Petersen found that, while there was little long-lasting hostility to arbitration decisions among the rank and file, the issues that induced the strongest reactions were job classifications, wages, and discipline. *Supra* note 3, at 615. The issues most likely to result in an effort to modify a contract provision were subcontracting, seniority, wages, and overtime. *Id.* at 614.

[5]Dworkin, *How Arbitrators Decide Cases,* 25 Lab. L.J. 208 (1974).

[6]Prihar, *Arbitration—As the Parties See It: IV. Another Management View,* in Arbitration: Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, ed. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1983), 74.

In one case the arbitrator was told at the hearing that an employee in a small company had returned to work after a year's absence. The employee was given back his job but was assigned to a new location. He objected to the change. No mention was made at the hearing about the reason for the year's absence, but it was clear that the grievant had never been subject to discipline, either at the time he absented himself or when he returned. Given the fact that the employee was not charged with being absent without permission, the arbitrator assumed that the company must have granted him some type of leave for the 12-month period, and he proceeded to decide the case on that basis. While this was not an unreasonable assumption, it was not an accurate one. The employee had apparently simply wandered off for the year and was taken back when he returned. The arbitrator compounded the problem by suggesting in his award that the result would have been different had the employee not been granted a bona fide leave. Happily, the parties' joint request for a clarification of the decision resulted in a satisfactory resolution of the dispute.

Asked why arbitrators may find themselves at cross-purposes with the parties, a West Coast practitioner suggested:

> Arbitrators are entering into an intimate relationship. The parties have hammered out numerous understandings over the years on their rights in a variety of areas. Arbitrators don't know the contract. They don't know the parties' past bargaining history. There is the danger that in an effort to display their virtuosity, they may intrude on other parts of the agreement and upset the balance that exists between the union and the employer.

The author of an unsigned editorial in the 1964 issue of the *Arbitration Journal* (whom I suspect, from the excellent quality of the writing, was my predecessor at the American Arbitration Association (AAA), Morris Stone) suggested that an arbitrator could reach a variety of conclusions from the fact that a contract was silent on a particular subject: (1) neither party elected to raise the subject, (2) the subject was raised but withdrawn in return for a different concession, (3) the subject was avoided because it was viewed as unresolvable and therefore a bar to settling the contract, or (4) the parties, while in agreement on the subject, thought it expedient for whatever reason not to express that agreement in writing. Another reason, I would suggest, closely allied to the second, is that the subject was raised, but the moving party was unable to prevail. The author con-

cluded: "Clearly, different histories of bargaining will yield different conclusions as to the obligations of the parties and the limits of unilateral action."[7] To this, one might add, and different awards—depending on what the arbitrator reads into the contract's silence and the silence of the parties on the subject.

The problems that arise as a result of drawing erroneous conclusions from inadequate information are incalculable. An arbitrator, for example, may cavalierly dismiss a long-term practice by suggesting that since it is merely a custom, management can abolish it at will if employees do not act appropriately. With the flick of a hand, a well-established right—long understood to exist by both parties—is wiped away. Conversely, management may find in future bargaining that the union believes it has a stronger claim to increased pay for certain work if an arbitrator has suggested in an offhand remark that employees performing these difficult tasks can never be compensated too highly. These examples point to the dangers of giving gratuitous advice, avoiding generalizations that invite misunderstandings, prejudicing the position of one party unfairly, and writing opinions that lead to future grievances rather than to foreclosing them.

In some instances arbitrators err because they are too familiar with the parties. They may feel that because of a long-standing relationship, they are free to provide advice and to dabble in shifting the balance of power—if even ever so slightly—between disputants. They often do so for the loftiest of reasons—for example, for the sake of "justice" or for creating "better relations" between two adversaries.

This was the situation in one case where, in the process of determining whether the termination of a 35-year employee was for just cause, the arbitrator learned that the employee had helped the owner to start the business. According to the grievant, he had been promised "a piece of the operation" but had never been granted it. His dispute with the owner festered for years until a minor incident arose and he was fired. The arbitrator concluded that the company did not have just cause to terminate the grievant and suggested that for the sake of equity, the owner should grant the grievant early retirement, paying

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[7]*The Hazards of Dicta in Labor Arbitration: An Editorial,* 19 Arb. J. 68 (1964). *See also* Mittenthal and Bloch, *Arbitral Implications: Hearing the Sounds of Silence,* in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington: BNA Books, 1990), 65–82.

him for a final year of service not performed. While this would have been a generous act, one must question the role of the arbitrator in offering the suggestion.

In a related case the arbitrator acknowledged that management had not violated the contract by denying holiday pay to an employee who had not worked the day before Labor Day, but opined that better labor relations would result if management did more for its employees than the contract required.

Harm to the Parties and Their Relationship

In rendering decisions, arbitrators are called upon to indicate whose interpretation of the contract is right and whose is wrong, whose actions are appropriate and whose are not. The manner in which we elect to do so may well have an impact on the future relationship between the parties. If we are unduly censorious ("The union mishandled the grievance from its inception") or quick to assess fault ("If the decision should be adverse to the union, it has only itself to blame"), the stature of one party in relation to the other may be affected adversely.

The task for the arbitrator is easier when both participants in a hearing have put forth well-presented cases. But this does not always happen. One party may not have raised the best argument; another may have cited the wrong contract clause to support its position or may have emphasized the wrong events. It may become apparent in the course of the hearing that one of the parties made a serious error in past bargaining (ceding a major right for a minor concession, for example). Arbitrators are sorely tempted in these instances to let the party in question know where it went wrong.

Rather than do so directly, often they attempt to soften the blow by addressing the subject obliquely: "If the parties had bargained differently . . . ," "if they had argued the case differently . . . ," or "if the situation was different . . . ," "I would have found in such and such a manner." Or, even more obliquely, arbitrators may indicate: "This award addresses only the question of management's actions on January 24. Its treatment of Joe Blow over the previous six months was not considered."

While some of us may feel that we have not discharged our duty adequately if we have not brought these errors to the parties' attention (assuming that this will aid them in presenting better cases in the future), others believe that it is our responsi-

bility only to respond to the case as presented, affording the greatest respect to each party's position, no matter how deficient it may be, and deciding the matter solely on the basis of the facts provided. Although this is a determination that each person must make, a growing number of arbitrators, especially those in ad hoc cases, are concluding that the greater wisdom may reside in adopting the latter course.

While some arbitrators may feel that they know the parties well enough to take a lighthearted or bantering approach in their decisions (as, for example, the neutral who upheld the discharge of a state correction officer for using cocaine and concluded: "Obviously, some things don't always go better with coke"), the reactions of those intimately involved in a case are not always predictable.

Awards

In providing remedies in their awards, arbitrators are occasionally guilty of both sins of omission and commission. While upholding the grievance of an employee bypassed for promotion, for example, the arbitrator omitted mentioning in his award that the employee was to be granted compensation from the time when the initial promotion was made (as was his intention). The employer's refusal to seek a clarification forced the union into court in an effort to endorse its position that back pay was due.

In another case, when a local school district was faced with a reduction in force, it made the decision to lay off one of two food service workers with the same seniority date. The arbitrator agreed with the district that its determination was not unreasonable, but directed in his award (perhaps in an effort to ease the loss for the grievant) that she was to be assigned all substitute work. Because of the arbitrator's lack of familiarity with the salary schedule in the parties' contract, he was unaware that the so-called "loser" would make more money working fewer days than the "winner," and thus end up in the preferred position. The problem created by the arbitrator's remedy was resolved three months later, after the district threatened to eliminate both positions if the matter was not settled through negotiations with the union. Lack of familiarity with the distinction between a rank and a grade led another arbitrator to write in his award that the grievant, a police sergeant, was to be reduced one grade to

the position of police officer. Unaware that there may be several grades within a rank, he caused the employee only to lose some salary rather than to suffer a demotion from a supervisory position.

In another case the arbitrator succeeded in alienating both the union and management by directing that any dispute over the amount of back pay due the grievant (after deductions were made for outside work performed during the time he was erroneously suspended) was to be settled by the Internal Revenue Service. The arbitrator in effect took the decision over the amount due out of the hands of the parties or any third party they might designate to settle the issue.

A few arbitrators have done more than merely suggest to the parties that they go beyond the dictates of the contract and take steps for their own good or for the good of an employee. In one award an arbitrator directed the employer to train its supervisors so that they would be more effective in meting out discipline. In another case management was directed to purchase a wristwatch for an employee who was chronically tardy.

Perhaps one of the most egregious errors an arbitrator can make is to go beyond the scope of the issue presented for determination and render a decision on a different matter. This happened in a case where a mechanic had been charged with insubordination for refusal to take a drug test. The arbitrator failed to address the question of insubordination and instead concluded that the employee was guilty of drug use.

All these problems—unanticipated by the arbitrator and unwelcomed by the parties—lead to one inescapable conclusion: In writing arbitration decisions, it is wise never to say too much—or too little.